

APPEAL NO. 040398  
FILED APRIL 14, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 27, 2004. The hearing officer determined that the appellant's (claimant) \_\_\_\_\_, compensable injury does not include a bilateral shoulder injury. The claimant appealed this determination on sufficiency of the evidence grounds. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant attached an operative report to his appeal, which was not admitted at the hearing and was dated after the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute admissible, newly discovered evidence. We conclude that this is one of the rare instances when attachments to the claimant's appeal in fact meet the requirements of newly discovered evidence necessary to warrant a remand. Having reviewed the report, we conclude that its admission on remand could result in a different decision. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The attached operative report is from a left shoulder surgical procedure, which was performed on February 5, 2004, and tends to show that the claimant had a partial thickness rotator cuff tear. Because the surgery was performed after the date of the hearing, there was no way that the claimant could have submitted it into evidence. Our review of the record indicates that the hearing officer appeared to have some concern that there were no objective findings that the claimant had in fact sustained a rotator cuff tear, as it was not noted on the MRI in evidence. On remand, the hearing officer is directed to consider the February 5, 2004, operative report, along with the evidence submitted at the January 27, 2004, hearing, and issue a new decision and order. The carrier shall be entitled to submit rebuttal evidence, which shall be limited to that operative report.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS  
350 NORTH ST. PAUL, SUITE 2900  
DALLAS, TEXAS 75201.**

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Daniel R. Barry  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The hearing officer makes clear in her decision that she did not believe that the claimant's bilateral shoulder injuries were caused by his work activities. Consequently, the post-operative diagnosis of the left shoulder, as reflected in the surgical report submitted on appeal, would not, in my opinion, warrant reversal. I would have affirmed the hearing officer's decision.

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Chris Cowan  
Appeals Judge